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No. -

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

AVRAM MACY KLAVAN,
PETITIONER,

v.

GARRIE JOAN KLAVAN,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

May the Commonwealth of Massachusetts exercise personal jurisdiction over a non-resident who has been personally served with process while physically present within the Commonwealth?

Has the petitioner voluntarily submitted to the jurisdiction of the Massachusetts Probate and Family Court by actively and fully participating in discovery and trial?

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Constitutional Provisions

United States Constitution, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Decisions

Bateman v. *Wood*, 297 Mass. 483, 9 N.E.2d 375 (1937).

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985).

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Shaffer v. *Heitner*, 433 U.S. 186 (1977).

Statutes

Massachusetts General Laws c. 227, § 1

A personal action shall not be maintained against a person not an inhabitant of the commonwealth un-

> less he or his agent appointed under section five or five A has been served with process in the commonwealth, or unless service has been made upon him outside the commonwealth, as authorized by chapter two hundred and twenty-three A, or unless an effectual attachment of his property within the commonwealth has been made upon a writ of attachment and in case of such attachment without such service, the judgment shall be valid only to secure the application of the property so attached to the satisfaction of judgment.

Decisions Below

The opinions of the Supreme Judicial Court of Massachusetts, the oral ruling of the Massachusetts Probate and Family Court denying the motion to dismiss, and the final decision of the Probate and Family Court have been accurately set forth in the Appendices to the Petition for Writ of Certiorari except that the petitioner has failed to include the Massachusetts Probate and Family Court's Judgment of Divorce Nisi. This judgment is attached hereto (App. 24a). In addition, the petitioner has incorrectly stated that the decision of the Supreme Judicial Court of Massachusetts is unreported. In fact, this decision is reported as *Klavan* v. *Klavan*, 405 Mass. 1105, 544 N.E.2d 863 (1989).

Statement of the Facts

This case involves a divorce action between the respondent, Garrie Klavan (hereinafter "Wife"), a Massachusetts resident, and Avram Klavan (hereinafter "Husband"), an Alaska resident. After participating fully in discovery and attending a four day

trial, the Husband is seeking to overturn the judgment of the Massachusetts Probate and Family Court on the basis that the Court lacked personal jurisdiction over him.

The parties were married in the state of New York in 1966. For most of the duration of their marriage the parties lived in Vermont. In 1983, the Husband deserted the family and moved to Alaska (App. 2a). In order to support her two children, the Wife left Vermont in July of 1985 and moved to Massachusetts. During the Summer of 1986 the Husband and the Wife agreed to meet in Vermont to discuss divorce (App. 3a, 19a). During this same summer the Wife was compelled to seek emergency medical treatment on three separate occasions[1] (App. 42a). Because of her poor physical condition the Wife could not meet the Husband as planned in Vermont. Accordingly, the parties agreed to meet in Massachusetts as they had done before (App. 42a). On August 14, 1986 the Husband was served with a summons and complaint for divorce as he disembarked his plane at Logan Airport in Boston, Massachusetts.

On or about January 9, 1987, counsel for the Husband filed a special appearance "only for the purpose of filing a motion to dismiss." (App. 20a.) The Husband based this motion on the grounds that the Wife had obtained service upon the Husband by fraud and deceit. The Husband made no claim in his motion to dismiss that he lacked sufficient minimum contacts with Massachusetts to support the exercise of personal jurisdiction. On January 30, 1987, the Massachusetts Probate and Family Court denied the Husband's motion to dismiss.

[1] The Wife suffered serious, life-threatening, illnesses during the course of the marriage. In 1972 she had a gall bladder operation with a difficult recovery which resulted in continuing back pain and pain radiating down her right side. In the mid-1970's, Wife suffered Cushing's Syndrome with symptoms including a deepening of her voice, increased muscle mass and hirsuitism (see Appendix to Petition for Writ of Certiorari). In 1982, the Wife underwent surgery for the removal of a malignant adrenal tumor. The Wife has also suffered osteoporosis with resultant deterioration of the jaw bone and tooth loss (*id.*).

Following the denial of his motion to dismiss, the Husband participated fully in discovery — propounded and answered interrogatories, exchanged documents with the Wife and took the deposition of the Wife and the Wife's medical expert. On June 4, 1987, the parties appeared for trial before the Massachusetts Probate and Family Court. After one day of trial the Court declared a mistrial on the basis that, without conducting further diagnostic tests, the Wife's medical expert could not conclusively diagnose the Wife's current physical condition.

The parties returned to the Massachusetts Probate and Family Court and attended a four day trial on September 14, 15, 16, and 17, 1987. The Husband attended all four days of trial and testified as a witness on his own behalf. Counsel for the Husband cross-examined both the Wife and the Wife's medical expert. On February 10, 1981, the Court entered a Judgment of Divorce Nisi. This judgment provided, *inter alia*, that the Husband would pay the Wife weekly support payments.

The Husband then appealed the Judgment of Divorce Nisi again arguing that the Wife had fraudulently lured him into Massachusetts for the sole purpose of serving process on him. Since the Husband had been served with process while within Massachusetts, the Husband aptly pointed out in his brief that the Massachusetts long arm statute was inapplicable (App. 5a).

Prior to the case being heard on appeal the Husband and Wife received a refund from a previously-filed income tax return. Significantly, this refund was initially held in escrow but then was divided equally as per the provisions of the Judgment of Divorce Nisi.

The Massachusetts Supreme Judicial Court transferred the case to its own docket and heard oral argument. The Court found specifically that the Wife had not tricked the Husband into coming to Massachusetts and, therefore, the Massachusetts Probate and Family Court had jurisdiction over the Husband.

The Court did not address the question of whether the Husband had sufficient minimum contacts with Massachusetts to support the exercise of personal jurisdiction.

Reasons Why the Petition Should Not Be Granted

This case does not present an unresolved question of federal law that should be settled by this Court. The decision of the Massachusetts Probate and Family Court in denying the Husband's motion to dismiss is consistent with Mass. Gen. L. c. 227, § 1 and with prior decisions of this Court. Since the seminal case of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), this Court has consistently held that a state court can validly exercise jurisdiction over a non-resident defendant who has been served with process while within that state. *See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

None of the cases cited by the Husband involve a factual situation similar to this case in which a non-resident defendant is served in state and then participates fully in discovery and trial. The cases of *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); and *Hanson* v. *Denckla*, 357 U.S. 235 (1958) all involve the exercise of jurisdiction over a foreign corporation and consider the question of when it can be said that the corporation is "present" in the state so as to be amenable to in personam jurisdiction. A guiding principle in the Court's analysis of this issue has been that a state court's exercise of jurisdiction must be consistent with traditional notions of "fair play and substantial justice". *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-17 (1945). The standard enunciated by *International Shoe* and its progeny was intended to supplement rather than replace "presence" as a jurisdictional

basis. *New York* v. *O'Neill*, 359 U.S. 1 (1959); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

It should be noted that contrary to the Husband's assertions, this case does *not* present a question of whether a state court can validly exercise personal jurisdiction over a non-resident defendant "whose sole contact with the state was a single visit during which he was served with process." (Petition for Writ of Certiorari, p. I.) The question of whether the Husband had sufficient minimum contacts with Massachusetts is raised for the first time in this appeal. This issue was *not* raised in the Husband's initial motion to dismiss, was not briefed by counsel, and was not addressed by the Massachusetts Supreme Judicial Court.[2] Consequently, this Court is not warranted in reviewing the Massachusetts Supreme Judicial Court's decision on the grounds asserted by the Husband. *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983); *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

[2] The issue before the Massachusetts Supreme Judicial Court was much narrower than that advanced by the Husband; namely, did the Massachusetts Probate and Family Court obtain valid personal jurisdiction over the Husband in light of the manner of service of process (App. 1a-9a). The Massachusetts Probate and Family Court and the Massachusetts Supreme Judicial Court both ruled that, since the Husband had not established that the Wife had fraudulently lured him into the Commonwealth for the purpose of serving process, service of process was valid, and the Massachusetts Probate and Family Court obtained personal jurisdiction over the defendant. More particularly, the issue before the Massachusetts Supreme Judicial Court was whether the Massachusetts Probate and Family Court was warranted in denying the Husband's motion to dismiss on the evidence presented (App. 1a-9a). The Husband argued on appeal that the trial court should have allowed the motion to dismiss since the Wife did not file a counteraffidavit or otherwise submit evidence refuting the allegations set forth in the Husband's affidavit. The Massachusetts Supreme Judicial Court disagreed with this argument.

The Husband Has Voluntarily Submitted to the Jurisdiction of the Massachusetts Probate and Family Court

Counsel for the Husband initially filed a special appearance solely for the purpose of filing a motion to dismiss (App. 20a). After this motion to dismiss was denied, the Husband participated fully in discovery and attended trial. Under Massachusetts law "one, adopting the form of special appearance in order not to submit to the jurisdiction of the court, brings himself within the jurisdiction by seeking relief in matters beyond the narrow field covered by the special appearance." *Leffler* v. *Todd*, 316 Mass. 227, 232, 55 N.E.2d 767 (1944). *See also Bateman* v. *Wood*, 297 Mass. 483, 486, 9 N.E.2d 375 (1937) ("A party may lose the right to object to lack of proper service of process by general appearance or by pleading to the merits."). In this case the Husband has certainly exceeded the scope of the special appearance. The Husband engaged in discovery, attended trial and, subsequent to trial, relied on the Judgment of Divorce Nisi to distribute an IRS refund. By these actions the Husband has implicitly submitted to the jurisdiction of the Massachusetts Probate and Family Court. If the Husband sincerely thought that the Massachusetts Probate and Family Court lacked jurisdiction, then the Husband need not have participated in discovery and trial. Alternatively, the Husband could have requested a stay of proceedings in order to allow him to appeal the jurisdictional issue. The Husband's voluntary and active participation in this case signals his implicit acceptance of the Massachusetts Probate and Family Court's jurisdiction. By travelling from Alaska to Massachusetts to stand trial, the Husband has "purposefully availed [himself] of the privilege of conducting activities within" Massachusetts. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

Granting the Petition Places an Unreasonable Burden on the Wife

If this Court were to find that the Massachusetts Probate and Family Court lacked jurisdiction, then the Wife would have no alternative but to initiate divorce proceedings in a forum in which the Husband is "present." At present, the only available forum for the Wife to obtain relief would be Alaska. (Vermont does not have jurisdiction since neither of the parties are residents.) (App. 45a.) The Husband is mindful of this fact and is using his jurisdictional challenge as an attempt to compel the Wife to accept a drastically modified settlement. To force the Wife to travel to Alaska to pursue a duplicate divorce action would place an unreasonable burden on her especially given her poor physical and financial condition. By challenging the jurisdiction of the Massachusetts Probate and Family Court at this late date, the Husband is attempting to engage in the type of forum shopping which is antithetical to due process. There can be no doubt that if the Husband has obtained a judgment in the Massachusetts Probate and Family Court more to his liking, then he would not have filed an appeal. The Husband is attempting to take two bites of the apple.

This Case is Significantly Different from *Burnham* v. *California Superior Court*

This case can easily be distinguished from *Burnham* v. *California Superior Court*, No. 89-44. In *Burnham*, after the Husband (a New Jersey resident) was served with process while visiting his Wife and children in California, he moved to stay those proceedings pending a jurisdictional appeal. Thus, while both cases involve challenges to jurisdiction in situations

where the defendants were served in state, the two cases stand on significantly different footings. First, the issue of minimum contacts is clearly the penultimate issue in *Burnham*. In *Burnham* both parties have thoroughly and cogently briefed this issue. In the instant case, however, since the issue of minimum contacts was not raised by the Husband in his motion to dismiss and was not at issue before the Massachusetts Supreme Judicial Court, this Court does not have authority (or sufficient information) to address this issue. Second, the interests of the parties are significantly different since the parties in this case have already invested substantial time and money in a trial. In *Burnham* the question is whether "fair play and substantial Justice" is better served by having a trial in California or in New Jersey. In this regard the parties in *Burnham* stand on equal footing. In the instant case, however, the question is whether "fair play and substantial justice" is served by compelling the parties to retry the case in Alaska. Such a retrial would place an unreasonable and disproportionate burden on the Wife.

Conclusion.

For all the reasons set forth herein and based upon all of the foregoing authorities, the Wife respectfully requests that this Court deny the Husband's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX.

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 88-P-1046.

NORFOLK COUNTY.

GARRIE JOAN KLAVAN,
APPELLEE,

v.

AVRAM MACY KLAVAN,
APPELLANT.

ON APPEAL FROM JUDGMENT ENTERED IN
THE PROBATE AND FAMILY COURT DEPARTMENT
OF THE TRIAL COURT, NORFOLK COUNTY.

Appellant's Brief.

Statement of the Issue.

Whether the Judgment of Divorce Nisi is void because of lack of jurisdiction over the defendant.

Statement of the Case.

On August 13, 1986, the plaintiff, Garrie Joan Klavan (Garrie), filed a complaint for divorce in the Norfolk Probate and Family Court against the defendant Avram Macy Klavan (Avram) alleging cruel and abusive treatment and irretrievable breakdown of the marriage (A. at 8). Avram filed a motion to dismiss the complaint, supported by affidavit, on the grounds that Garrie had obtained invalid service upon him through fraud and deceit by deceiving him into coming to Massachusetts solely for the purpose of obtaining service upon him (A. at 13-14). Avram's attorney also filed a special appearance for the purpose of presenting the motion to dismiss (A. at 18). A hearing on the motion to dismiss took place without an evidentiary hearing on January 30, 1987 (A. at 21, 24). The Court (Farrell J.) denied the motion to dismiss from the bench (A. at 21, 24). The action was tried on September 14, 15, 16, 17, 1987 (A. at 1). A Judgment of Divorce Nisi entered on February 10, 1988 (App. at 22). Avram filed a timely notice of appeal on March 9, 1988 (A. at 5).

Facts.[1]

Garrie and Avram were married at Monsey, New York on May 29, 1966 (A. at 8, 15). From 1972 through 1983 they resided in Essex Junction, Vermont (A. at 15-16). Marital difficulties arose in 1981-82 (A. at 16). Due to financial problems and the need to obtain increased funds, Avram left Vermont in the summer of 1983 to live and work in Alaska (A.

[1] All facts here presented are derived solely from the complaint, Avram's affidavit in support of his motion to dismiss, the docket and transcript of the hearing on the motion to dismiss.

at 16). Garrie and the two children of the marriage remained in Vermont until January 1985 when Garrie came to Alaska in an effort to reconcile (A. at 16). In March 1985 Avram travelled to Vermont, remaining there two weeks in an attempt to reconcile (A. at 16).

In July or August of 1985, Garrie moved to Massachusetts (A. at 16). Despite renting the Vermont marital home for $700 a month, Garrie failed to pay the monthly mortgage of $133 resulting in foreclosure proceedings (A. at 16).

On August 6, 1986, Avram arrived in New York to visit his mother (A. at 17). He had planned then to go to Vermont to meet Garrie and finalize litigation relating to the foreclosure proceedings and divorce (A. at 17). Upon his arrival in New York, Avram spoke to Garrie by telephone (A. at 17). Garrie refused to meet Avram in Vermont and demanded he come to Boston (A. at 17). Garrie became hysterical and screamed that he had come to Boston so they could talk (A. at 17). Garrie made no mention of a divorce in Massachusetts (A. at 17). Avram acquiesced to Garrie's request (A. at 17). Upon disembarking from the plane at Logan Airport in Boston, Avram was served by a constable with the Summons and Complaint in this action (A. at 12, 17) which was the only method of service ever undertaken to serve the complaint upon him (A. at 1-7).

Avram filed a motion to dismiss the complaint, in lieu thereof, to quash the return of service on the grounds that Garrie fraudulently deceived Avram into coming to Massachusetts only for the purpose of obtaining service upon him (A. at 13). Avram's attorney filed a special appearance solely for the purpose of contesting jurisdiction (A. at 18). Avram also submitted an affidavit in support of the motion to dismiss and motion to waive the requirement he attend the hearing on the motion to dismiss (A. at 15-20).

Garrie's complaint for divorce alleged she resided in Brookline, Norfolk County, and that Avram resided in Anchorage,

Alaska (A. at 8). She further alleged they last lived together in South Burlington, Vermont in August 1983, and that the grounds for the complaint occurred in Vermont on or about August 1983 (A. at 8).

On January 30, 1987, a hearing on Avram's motion to dismiss took place in the Norfolk Probate and Family Court. No oral testimony nor any evidence other than Avram's affidavit was presented to the Court (A. at 15-17, 24-29). Garrie did not offer a counter-affidavit and did not testify although she was present and spoke on other matters at the hearing (A. at 26-28). The Court (Farrell, J.) indicated to counsel that he had their written submissions and offered each the opportunity to argue, which each declined (A. at 24). Whereupon, the Court, without further comment or finding, ruled from the bench denying the motion to dismiss (A. at 24).

Argument.

THE JUDGMENT OF DIVORCE NISI IS VOID BECAUSE THE PROBATE AND FAMILY COURT LACKED PERSONAL JURISDICTION OVER THE DEFENDANT WHERE SERVICE WAS ACCOMPLISHED BY FRAUD AND DECEIT.

A valid judgment imposing a personal obligation or duty in favor of a plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Kulko* v. *Superior Court of California, Etc.*, 436 U.S. 84, 91 (1978); *Pennoyer* v. *Neff*, 95 U.S. 714, 732-733 (1878). Personal jurisdiction depends upon the presence of notice to the defendant and a sufficient connection based upon minimum contacts between the defendant and the forum State to require a defense of the action in the forum State. *Kulko, supra*, 436 U.S. at 91-92.

The Massachusetts Probate and Family Court may exercise divorce jurisdiction based solely upon the domicile of the plaintiff, even if the defendant neither appears nor is personally served.[2] *Fiorentino* v. *Probate Court*, 365 Mass. 13, 17, 310 N.E.2d 112, 116 (1974); G.L. c. 208, Section 5. The plaintiff, nevertheless, must still show that service was made by one of the methods authorized by Mass. R. Dom. Rel. Pro. 4. See Mass. R. Dom. Rel. Pro. 4, Reporter's Notes, (unless defendant not amenable to service, absent valid in-hand service upon defendant, substitute service may only be obtained upon order of the Court by filing motion for service by publication and mailing); see generally *Wiley* v. *Wiley*, 328 Mass. 348, 349, 103 N.E.2d 699, 700 (1952) (upon substituted service court has jurisdiction to order modification of the incidents of the status of marriage). In order to divide marital assets and award alimony, however, the Probate and Family Court must have personal jurisdiction over the defendant, and the plaintiff must, without exception, make personal service upon the defendant. *Schmidt* v. *Schmidt*, 280 Mass. 216, 219-221, 182 N.E. 374, 376 (1932).[3]

Faced with a motion to dismiss for lack of personal jurisdiction over the defendant, the plaintiff bears the burden of establishing sufficient facts on which to predicate jurisdiction over the defendant. *Good Hope Industries, Inc.* v. *Ryder Scott Co.*,

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[2] Jurisdiction under the long-arm statute, G.L. c. 223A, Section 3 is not applicable in this action. The parties did not maintain a marital domicile in Massachusetts at any time (G.L. c. 223A, Section 3(g)) and nothing in the record suggests Avram ever transacted any business in Massachusetts (except for the day he was served with process) to warrant a finding that he had sufficient minimum contacts with Massachusetts to assert jurisdiction under G.L. c. 233A, Section 3(a). See *Morrill* v. *Tong*, 390 Mass. 120, 129-134, 453 N.E.2d 1221, 1227-1229 (1983) (finding lack of sufficient minimum contacts to assert personal jurisdiction under G.L. c. 223A, Section 3(a)).

[3] The same requirement of personal jurisdiction and personal service applies to support orders issued pursuant to G.L. c. 209, Section 32. *Katz* v. *Katz*, 330 Mass. 635, 639, 116 N.E.2d 273, 276 (1953); *Wiley* v. *Wiley*, 328 Mass. 348, 349, 103 N.E.2d 273, 276 (1952).

378 Mass. 1, 3, 389 N.E.2d 76, 78 (1979). The plaintiff may not rely on the bare pleadings to withstand a motion to dismiss based upon lack of personal jurisdiction, but rather, must respond with actual proof and not mere allegations, since the plaintiff bears the burden of proof to establish jurisdiction. *Time Share Vacation Club* v. *Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984); see *Alden Transportation Co., Inc.* v. *Bloom*, 11 Mass. App. 920, 920, 415 N.E.2d 250, 250-251 (1981) (summary judgment entered in favor of moving party where opposing party did not file counter affidavit and based opposition solely upon allegations contained in verified complaint; *Noyes* v. *Quincy Mutual Fire Ins. Co.*, 7 Mass. App. 723, 725-726, 389 N.E.2d 1046, 1048 (1979) (faced with motion for summary judgment opposing party may not rest on pleadings, but must allege specific facts which establish triable issue).

Avram's attorney specially appeared to contest jurisdiction and submitted Avram's affidavit alleging specific facts that the Probate and Family Court lacked jurisdiction. Garrie, however, failed to meet her burden of proof as she not submit a counter-affidavit, testimony or other admissible evidence in opposing the motion to dismiss.[4] For purposes of ruling on the motion to dismiss, therefore, all the allegations contained in Avram's affidavit must be accepted as being true. See *U.S. Fidelity and Guaranty Company* v. *N.J.B. Prime Investors*, 6

[4]Garrie did submit a brief in opposition to the motion to dismiss. Briefs, however, are not sources of evidence that the Court may consider on a motion to dismiss. *Harry Winston, Inc.* v. *Waldfogel*, 292 F. Supp. 473, 476 (S.D.N.Y. 1968); see *Collins* v. *Keefe*, 332 Mass. 375, 379, 124 N.E.2d 910 (1955) (Court cannot accept as evidence statements of counsel appearing only in briefs and not shown to be supported by the record); *Peluso* v. *Peluso*, 5 Mass. App. 906, 906, 370 N.E.2d 723, 723 (1977) (Appeals Court will not consider "facts" appearing in affidavit appended to appellate brief and set forth in appellate brief as "facts" occurring in lower court proceeding where affidavit not part of the record). Garrie also did not testify at the hearing on the motion to dismiss although she was present and addressed the Court on other matters.

Mass. App. 455, 456 n.3, 377 N.E.2d 440, 441 n.3 (1978); Mass. R. Civ. P. 56(e).

Avram's affidavit established he had been a resident of Alaska since August 1983 and prior to that he had lived with Garrie in Vermont as husband and wife from 1972 through 1983. When Avram telephoned Garrie in August 1986 asking her to meet him in Vermont to discuss settlement of litigation relating to the marital home in Vermont and possible divorce proceedings, she refused to go to Vermont. When Avram said he would not come to Boston, Garrie became hysterical and screamed that Avram had to come to Boston so they could talk. No mention was made of bringing divorce proceedings in Massachusetts. Avram told Garrie of his airplane arrangements and upon his arrival in Boston he was served with the summons and complaint as he left the plane.

Under the facts before the Court, which were uncontroverted by any evidence offered by Garrie, the Probate and Family Court erred in denying Avram's motion to quash service and to dismiss the complaint. It is a long established principal of law that when

> a person is induced by the artifice or fraud to come within the jurisdiction of the Court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon a proper showing.

Commercial Mutual Accident Company v. *Davis*, 213 U.S. 245, 246 (1909); see generally 98 A.L.R. 2d 551 and cases cited at 556-558 (1964).[5] Other courts have invoked this prin-

[5] Apparently, no reported Massachusetts cases have addressed this issue. Two Massachusetts Federal District Court cases, however, recognize this principal. See *Willametz* v. *Susi*, 54 F.R.D. 463, 463 (D. Mass. 1972) (false representations used to entice defendant into district constitute abuse of process

cipal in situations where, as here, the plaintiff asks the defendant to come to the jurisdiction, ostensibly to discuss settlement of a dispute, without revealing that upon entering the jurisdiction the plaintiff will serve process upon the defendant. E.g., *Coyne* v. *Grupo Industrial Trieme, S.A.*, 105 F.R.D. 627, 630 (D. D.C. 1985); *E/M Lubricants, Inc.* v. *Microfral, S.A.R.L.*, 91 F.R.D. 235, 237 (N.D. Ind. E.D. 1981); *Oliver* v. *Cruson*, 153 F. Supp. 74, 78 (D. Mont. 1957). The same rule against service by trick has been applied in the context of divorce proceedings. *Heston* v. *Heston*, 52 N.J. Eg. 91, 91-92, 28 A. 8, 8 (1873); see *Zenker* v. *Zenker*, 161 Neb. 200, 204-216, 72 N.W.2d 809, 816-819 (1955) (defendant induced to travel to Colorado on representation his presence was required to effectuate conveyance of real estate and served with process for divorce upon arrival).

Garrie's duplicity and intent in luring Avram into Massachusetts is readily apparent. Garrie never mentioned that she was filing for divorce in Massachusetts. She had a constable waiting at the airport to make service as soon as Avram stepped off the plane. Under these circumstances courts have found that the plaintiff's real purpose was not to conduct settlement discussions, but rather, was to serve the defendant with process, and accordingly, have quashed the service of process. *Coyne, supra*, 105 F.R.D. at 629; *Sunshine Kitchens, Inc.* v. *Alanthus Corp.*, 65 F.R.D. 4, 5 (S.D. Fla. 1974).

Avram had no reason to set foot in Massachusetts other than to speak to Garrie at her request. There is a strong presumption in favor of quashing service under these circumstances whenever a defendant travels to the jurisdiction for settlement talks at the plaintiff's behest and the plaintiff does not unequivocally tell the defendant before the trip that the defendant will be served. *Coyne, supra*, 105 F.R.D. at 630.

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requiring process to be set aside); *Union Sugar Refinery* v. *Mathieson*, 2 Cliff 304, F. Cas. No. 14392, 24 Fed. Cas. 680, 681 (1864) (recognizing principal).

The uncontroverted facts contained in Avram's affidavit establish that in this case the Probate and Family Court erred in denying the motion to dismiss. Avram was a non-resident who was induced through false pretenses to enter Massachusetts solely for Garrie to make service of process upon him. Absent valid personal service, the Probate and Family Court lacked personal jurisdiction to order a division of assets under General Law chapter 208, Section 34. *Schmidt, supra*, 280 Mass. at 219-221, 182 N.E. at 376; see *Wyman* v. *Newhouse*, 93 F.2d 313, 315 (2d Cir. 1937) (judgment attacked for fraud goes to personal jurisdiction of Court over defendant, judgment procured fraudulently lacks jurisdiction and is null and void). As the record fails to disclose that any other form of service was made upon Avram, the entire Judgment of Divorce Nisi entered pursuant to General Law Chapter 208, Section 5 is also void due to lack of service of process.

Conclusion.

The Court should reverse the decision of the Probate and Family Court denying the defendant's motion to dismiss, quash service of process on the grounds that service was procured by fraud and annul the Judgment of Divorce Nisi entered on February 10, 1988, on the basis of lack of personal jurisdiction and failure to make service of process.

Respectfully submitted,

AVRAM KLAVAN
By his attorneys,
KASSLER AND FEUER
ALAN S. GEISMER, JR.
MARK RODER
85 Devonshire Street
Boston, MA 02109
(617) 227-4800

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 88-P-1046.

NORFOLK COUNTY.

GARRIE JOAN KLAVAN,
APPELLEE,

v.

AVRAM MACY KLAVAN,
APPELLANT.

ON APPEAL FROM JUDGMENT ENTERED IN
THE PROBATE AND FAMILY COURT DEPARTMENT
OF THE TRIAL COURT, NORFOLK COUNTY.

APPENDIX.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D1

COMPLAINT FOR DIVORCE

GARRIE JOAN KLAVAN, Plaintiff

v.

AVRAM MACY KLAVAN, Defendant

1. Plaintiff, who resides at 20 Stearns Road, Brookline, County of Norfolk was lawfully married to the defendant who now resides at 9701 Vanguard Drive, Anchorage, Alaska.
2. The parties were married at Monsey, New York on May 29, 1966 and last lived together at South Burlington, VT on August, 1983.
3. The minor children of this marriage, and date(s) of birth - is - are:
   Arni Joyce; Sept. 30, 1967
   Michael Eric; Nov. 10, 1969
4. Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, or custody of children has been brought by either party against the other _____
5. On or about August, 198 3, the defendant was cruel and abusive to the plaintiff by acts of mental cruelty on diverse dates and the divergent goals of the parties resulted in an irretrievable breakdown of the marriage.
6. Wherefore, plaintiff requests that the Court:
   - ☒ waive the 30-day requirement for filing this complaint
   - ☒ grant a divorce for cruel and abusive treatment and irretrievable breakdown.
   - ☐ prohibit defendant from imposing any restraint on plaintiff's personal liberty
   - ☒ grant her custody of the above-named children
   - ☒ order a suitable amount for support of the plaintiff and said minor children
   - ☐ order conveyance of the real estate located at _____ _____ standing in the name of _____ _____ as recorded with _____ Registry of Deeds, Bk. _____ Pg. _____
   - ☐ allow plaintiff to resume her former name of _____
   - ☒ order a division of the assets under M.G.L. c. 208, § 34

Dated: August 8, 1986 /s/ Peter F. Zupcofska
Signature of Attorney

Plaintiff's Signature, if Pro Se

Margot Ames Clower
Burns & Levinson
50 Milk Street
Boston, MA 02109
Print name and address

COMMONWEALTH OF MASSACHUSETTS

NORFOLK DIVISION PROBATE AND FAMILY COURT
DOCKET NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

vs.

AVRAM MACY KLAVAN,
Defendant

MOTION TO WAIVE THE
NECESSITY OF IDENTIFYING WITNESS

Now comes Garrie Joan Klavan, plaintiff in the above-captioned case, and requests that this Honorable Court waive the necessity of an identifying witness in effectuating service of the Summons on her Complaint for Divorce.

In support of her motion, the plaintiff states that there are no unrelated third parties available in the Commonwealth of Massachusetts to serve as an identifying witness. The defendant has been living in Alaska since the parties' separation three years ago. The constable and/or deputy sheriff effectuating service of said Complaint can be provided with an adequate description and photograph to ensure positive identification of the defendant in this Complaint.

WHEREFORE, the plaintiff requests that this Honorable Court waive the necessity of an identifying witness upon effectuating service of her Complaint for Divorce.

Respectfully submitted,

PETER F. ZUPCOFSKA
MARGOT AMES CLOVER
BURNS & LEVINSON
50 Milk Street
Boston, Massachusetts 02109
(617) 451-3300

Dated: 8 August, 1986

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D1

DOMESTIC RELATIONS SUMMONS

Garrie Joan Klavan, Plaintiff

v.

Avram Macy Klavan, Defendant

To the above-named Defendant:

You are hereby summoned and required to serve upon Peter F. Zupcofska plaintiff's attorney whose address is BURNS & LEVINSON, 50 Milk Street, Boston, MA 02109 a copy of your answer to the complaint for Divorce which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, the Court will proceed to the hearing and adjudication of this action. You are also required to file your answer to the complaint in the office of the Register of this Court at Dedham either before service upon plaintiff's attorney or within a reasonable time thereafter.

Witness ROBERT M. FORD Esquire, First Justice of said Court at Dedham.

August 13, 198 6

_____
Register of Probate

ACCEPTANCE OF SERVICE

I, _____, the above-named Defendant hereby accept service of this summons and understand that judgment may be rendered against me in accordance with the complaint a copy of which I have received this day.

_____ _____
Signature of Defendant

_____ Division Date: _____

Then personally appeared the above-named _____ who made oath that the foregoing acceptance was his free act and deed.

Signature of Notary Public _____

Print Name _____

My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. _____

PROOF OF SERVICE

I hereby certify and return that on August 14, , 198 86 , I served a copy of the within summons, together with a copy of the complaint in this action upon the within-named defendant in the following manner, — *by giving in hand to the within-named defendant; Avram Macy Klavan. Said service was made at Logan International Airport, Piedmont Airlines, Flight #1382, East Boston, Massachusetts. *SERVED WITH MOTION TO WAIVE THE NECESSITY OF IDENTIFYING WITNESS IN THE PRESENCE OF* N.A. *of* _____ who identified said defendant (italics applicable to Divorce Complaint only).

August 14, 1986 Signed under the pains and penalties of perjury.

Date

August 14, 1986 /s/ Bernard Witten

Date of Service Signature of officer or other server

AFFIDAVIT OF IDENTIFYING WITNESS
(APPLICABLE IN DIVORCE ACTION ONLY)

I, _____, of _____ hereby certify that I personally know the defendant named herein, that the defendant is the spouse of the plaintiff and was served with a copy of this summons together with a copy of complaint for divorce in my presence on _____, 198____, at (street & number) (city or town) (state).

Signed under the pains and penalties of perjury.

_____

PROOF OF SERVICE OF DISINTERESTED SERVER WHO IS ALSO IDENTIFYING WITNESS (APPLICABLE IN DIVORCE ACTIONS ONLY)

I, _____, of _____
hereby certify that I personally know the defendant named herein, that the defendant is the spouse of the plaintiff and was served by me with a copy of this summons together with a copy of complaint for divorce on _____, 198_____
at _____
(street and number) (city or town) (state)

Signed under the pains and penalties of perjury.

Note: The signature of the defendant must be notarized by a disinterested notary or justice of the peace who is neither associated in business with nor employed by the plaintiff or his attorney.

Note: Service of process must comply with Massachusetts Rules of Domestic Relations Procedure Rule 4.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

TRIAL COURT
PROBATE & FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

MOTION TO DISMISS

AVRAM MACY KLAVAN,
Defendant.

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court:

1. Dismiss the above-captioned matter or in lieu thereof, to quash the return of service and as reason therefor states that the Plaintiff obtained service upon him by fraud and deceit in that she deceived him into appearing in the Commonwealth of Massachusetts solely for the purpose of obtaining service upon him, all as more fully set forth in the Defendant's Affidavit attached hereto and made a part hereof as Exhibit A.

2. Dismiss the motion as it is more properly brought in the State of Vermont and as reason therefor states that the Plaintiff and Defendant never lived as Husband and Wife in the Commonwealth of Massachusetts and that substantial relevant evidence concerning the marital relationship can be provided by witnesses who reside in the State of Vermont.

By his attorney,

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

January 9, 1987

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Motion to Dismiss upon the Plaintiff by delivering same, in hand, to Margot Clower, Attorney at Law, Plaintiff's counsel of record, at Burns and Levinson, 50 Milk Street, Boston, MA, 02109 together with notice that same motion is marked for hearing at Norfolk Probate and Family Court in Dedham on Tuesday, January 13, 1987.

Signed under the pains and penalties of perjury.

January 9, 1987 Paul M. Kane

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY COURT
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

AVRAM MACY KLAVAN,
Defendant

AFFIDAVIT OF DEFENDANT,
AVRAM MACY KLAVAN

NOW COMES the Defendant, Avram Macy Klavan, who on oath deposes and says:

1. My name is Avram Macy Klavan, and I live in Anchorage, Alaska, where I have resided since August, 1983.

2. Garrie Joan Klavan and I were married in Monsey, New York, on May 29, 1966.

3. There are two children born of the marriage. Their names and dates of birth are:

Arni Joyce Klavan, born September 30, 1967
Michael Eric Klavan, born November 10, 1969

Arni is currently a student at Bar Elan in Ramat Gan, Israel. Michael resides with his grandmother in Plantation, Florida.

4. From January, 1970, until November, 1982, I was employed as a technical associate engineer with International Business Machines, located in Essex Junction, Vermont. During 1978-79, my wife operated a court reporting business. We owned a restaurant beginning September/October, 1981 and another restaurant during 1983.

5. Severe marital problems surfaced in 1981/82.

6. During the summer of 1983, we suffered from financial problems and after discussions concerning the need for increased funds, I left for Alaska.

Prior to my departure, I executed a general power of appointment naming my wife as my attorney in full.

I am informed and therefore believe that within two days of my leaving for Alaska, my wife ceased operating the restaurant.

7. My wife and children remained in Vermont until January, 1985, when, in an effort to reconcile, she came to Alaska for approximately two weeks. During this period, my wife and I looked for property and my wife submitted resumes to potential employers.

8. In March, 1985, I travelled to Vermont and remained there for approximately two to three weeks, again in an effort to seek a reconciliation.

9. In July or August, 1985, my wife moved to Massachusetts. I am informed and therefore believe that my wife rented our Vermont home for approximately $700 per month. However, she paid the mortgage of $133.00 per month for only a few months. As a result of her failure to pay the mortgage, foreclosure proceedings were instituted.

10. In July, 1986, I decided to travel to New York to visit my ailing mother. I planned to meet my wife in Vermont in order to finalize litigation involving the former marital residence and restaurant and to complete divorce proceedings.

11. I arrived in New York on or about August 6, 1986. In a telephone conversation, my wife advised me that she would not come to Vermont but inquired whether I would instead come to Boston. When I stated that I would not, she became hysterical and screamed that I had to come to Boston so that we could talk. No mention was made of divorce.

I acquiesced and subsequently advised her of my plane reservations.

Upon debarking from the plane in Boston, I was served with a Complaint for Divorce and a summons.

Sworn to under the pains and penalties of perjury.

Date: _____

Avram M. Klavan

SUBSCRIBED AND SWORN TO BEFORE me this 19th day of November, 1986.

/s/ Susie Bell

Notary Public for Alaska

My commission expires: 11/18/88

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

SPECIAL APPEARANCE

AVRAM MACY KLAVAN,
Defendant

NOW COMES Paul M. Kane, Esquire, and files a special appearance only for the purpose of filing a motion to dismiss the above-captioned matter.

By his attorney,

January 9, 1987

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Appearance to Contest Service upon the Plaintiff by delivering same, in hand, to Margot Clower, Attorney at Law, at Burns and Levinson, 50 Milk Street, Boston, Massachusetts 02109.

Signed under the pains and penalties of perjury.

January 9, 1987

/s/ _____
Paul M. Kane

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

AVRAM MACY KLAVAN,
Defendant

MOTION TO WAIVE REQUIREMENT THAT DEFENDANT ATTEND HEARING

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court waive the requirement that he attend the hearing scheduled for January 30, 1987, and as reason therefor states:

(1) That he resides in Anchorage, Alaska;

(2) That the cost of the trip will be approximately $1,600, including lodging;

(3) That the Defendant has filed an Affidavit which presents the substance of his testimony.

By his attorney,

January 27, 1987

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Motion to Waive Requirement that Defendant Attend Hearing by delivering same, in hand, to Margot Clower, Attorney at Law, Plaintiff's counsel of record, at Burns and Levinson, 50 Milk Street, Boston, Massachusetts, together with notice that same action is marked for hearing at 10:00 a.m. on Friday, January 30, 1987, at Norfolk Probate and Family Court in Dedham.

Signed under the pains and penalties of perjury.

By his attorney,

January 27, 1987

_____

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

MOTION TO DISMISS

AVRAM MACY KLAVAN,
Defendant

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court:

1. Dismiss the above-captioned matter or in lieu thereof, to quash the return of service and as reason therefor states that the Plaintiff obtained service upon him by fraud and deceit in that she deceived him into appearing in the Commonwealth of Massachusetts solely for the purpose of obtaining service upon him, all as more fully set forth in the Defendant's Affidavit attached hereto and made a part hereof as Exhibit A.

2. Dismiss the motion as it is more properly brought in the State of Vermont and as reason therefor states that the Plaintiff and Defendant never lived as Husband and Wife in the

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D11

JUDGMENT OF DIVORCE NISI

Garrie Joan Klavan, Plaintiff
of _____
v.
AVRAM MACY KLAVAN, Defendant
of _____

All persons interested having been notified in accordance with law and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of cruel and abusive treatment as provided by Chapter 208, §§ 1-2 and that upon and after the expiration of ninety (90) days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that the defendant is to pay the plaintiff the sum of Four Hundred and 00/100 ($400.00) Dollars forthwith and the further sum of Four Hundred and 00/100 ($400.00) Dollars on each and every week hereafter beginning on Friday, February 12th, 1988, by way of wage assignment. The money in plaintifff and defendant's escrow account of approximately $14,000.00 is to be forthwith assigned and turned over to the plaintiff. Each party shall retain the personal property (including automobiles) in their respective possession. Each party will retain whatever cash, stock, pension accounts, bank accounts now standing in their respective names. The parties shall retain their joint interest in business assets and in all monies due to the Internal Revenue Service. The defendant shall pay the plaintiff in or within six (6) months from the

date hereof the sum of $5,000.00 as attorney's fees. The defendant shall maintain the plaintiff and the children on his medical health insurance coverage program so long as they are eligible without additional cost to them. He shall at all times keep the plaintiff covered to no less extent than she is presently covered and shall be responsible for payment of one-half of her reasonable uninsured medical, dental and hospital expenses upon receipt of validated invoices which shall be promptly rendered. The plaintiff shall remain or be reinstated as primary beneficiary of the defendant's present life insurance policies. No encumbrances shall be put upon said insurance policies and the plaintiff shall be given such evidence, as may be reasonably required by her, of the policy remaining in full force and effect. The defendant will advise the insurer to notify the plaintiff of any prior notice of cancellation.

Feb. 10, 1988
Date

Justice of the Probate
and Family Court

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

Probate Court
Dedham Division
No. 86D-1093-D1

Klavan

vs.

Klavan

Atty. for Garrie Klavan: Peter Zupcofska, Esq.

Atty. for Avram Klavan: Paul M. Kane, Esq.
McGrath and Kane
4 Longfellow Place
Boston, MA 02114
(617) 523-5600

Judge
On the Motion to Dismiss, I have in fact read the Motion and both submissions. . . .

Atty.
Then I will rest on the Motions and the affidavit.

Judge
I will be happy to hear your argument if you wish to, if you want to say anything further on it.

Atty.
No, I think that's all set out there and the Court has indicated that it has read the appropriate pleadings.

Judge
Well, I am going to deny the Motion to Dismiss. Now, there's a Motion for a financial statement. Is your client with you today?

Atty. for Mr. Klavan
No, he is not, Your Honor.

Judge
Where is he?

Atty. for Mr. Klavan
He's in Alaska. When we received notice . . . originally this was marked it was a Motion and as soon as we received notice that they wanted a Hearing I filed a Motion to preclude his attendance. I also, when Mr. Gregory indicated to me that he wanted to, if the Court denied my Motion, he wanted to proceed on the support issues. I immediately sent out the materials to my client. He spends approximately two weeks a month in the North, so I understand from a telephone conversation between him and my secretary that he has completed the materials and is sending them back here.

Judge
Can you have a financial statement in 45 days?

Atty. for Mr. Klavan
Oh, I can have it within two weeks, Your Honor.

Judge
I'll give you 30 days.

Atty. for Mr. Klavan
Thank you.

Atty. for Mrs. Klavan
Your Honor, if I could just point out, we did serve them for financial statement in November.

Judge
Well, he can have 30 days. Now, Motion for temporary support.

Atty. for Mr. Klavan (Plaintiff)
I should point out that since the time that we drafted that Motion the plaintiff has lost her job at the [inaudible] and is currently on unemployment.

Judge
Well, there are how many children? Two?

Mrs. Klavan
Two, seventeen and nineteen.

Judge
What's the nineteen year old doing?

Mrs. Klavan
She's a student, in Israel.

Judge
She's . . . that require any support?

Mrs. Klavan
Yes, she is financing her tuition through scholarship but her personal needs, room, board, medical insurance, telephone calls, transportation are all something that either she has to . . .

Judge
What kind of transportation?

Mrs. Klavan
She had to pay her own way to get to Israel.

Judge
She elected to go there?

Mrs. Klavan
Right.

Judge
And there are lots of schools, she could have gone to the University of Massachusetts . . .

Mrs. Klavan
Actually, this school that she's going to in Israel is a part of the State University of New York.

Judge
What does it cost? What do you . . . What kind of expenses are you looking for on a temporary basis for temporary support?

Mrs. Klavan
For both myself and the two children?

Judge
Well, as . . . How about the child. There is something about the other child being in Fort Lauderdale?

Mrs. Klavan
Yes, Michael is living in Fort Lauderdale with my mother and finishing high school there.

Judge
How old is he?

Mrs. Klavan
Seventeen.

Atty. for Plaintiff
Your Honor, we intentionally did not put down any figure on the Motion for temporary support pending receipt of the 401 statement and leaving it to your discretion.

Judge
Well, I don't have to take this Motion up today. If you want another date on it . . .

Atty. for Mr. Klavan
I could put it on, Your Honor, for two weeks. Since 1983 this party has been separated and I can't imagine the emergency, and I would like to look at my client's financial statement, too, and documents.

Judge
Well, first of all the nineteen year old I don't look upon it as support. I know there is case law about that but there is a statute that calls for educational expenses. I would think that it would be more than this situation, where it sounds a little bit to me, at least from what little I've heard, that this young woman is on her own, really. She is making up her own mind where she is going, she is living in Israel. It sounds like educational expenses and not support.

Mrs. Klavan
Well, in truth, the reason that she went to Israel was because she was offered a scholarship. Had she stayed in the United States, she could not have afforded tuition.

Judge
Well, I don't adjudicate cases on . . .

Mrs. Klavan
O.K., but that is why she left.

Judge
. . . what might have been. I adjudicate on what is. She is there. I want to know what her expenses are and I mean her education expenses. And I will consider those. As far as the young man in Florida is concerned, I want to know what it costs to support him and what's going on there and your financial statement would show what your situation is, too, if there is a change in your employment, that should be reflected and updated. Why don't we continue the Motion for a temporary support to some two weeks from now. It will have to be a Tuesday to a Friday. (discussion of available dates with unnamed participant here). Put it for 9:30 the 17th, sometimes we can start earlier and sometimes we can't. It depends on the [inaudible]. O.K.

Attys.
Thank you, Your Honor.

(Tape stops here and restarts with an unrelated case — remainder of tape blank)

CERTIFICATE

I, Nancie Ann Mossman, do hereby certify that the foregoing transcript was prepared by me and is a true and accurate record to the best of my knowledge, skill and ability.

Date: April 9, 1988

_____

Nancie Ann Mossman

COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

NORFOLK, SS. 1988 SITTING

NO. 88-P-1046

GARRIE JOAN KLAVAN
APPELLEE

v.

AVRAM MACY KLAVAN
APPELLANT

APPELLEE'S BRIEF

III. STATEMENT OF THE ISSUE

Whether the Probate and Family Court properly denied the defendant's motion to dismiss based on lack of personal jurisdiction.

IV. ARGUMENT

THE PROBATE AND FAMILY COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS AS THE PLAINTIFF SUSTAINED HER BURDEN OF PROOF AND ESTABLISHED A PRIMA FACIE SHOWING OF PERSONAL JURISDICTION. CONSEQUENTLY, THE JUDGMENT OF DIVORCE NISI IS VALID AND ENFORCEABLE AS THE PROBATE AND FAMILY COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANT.

The defendant's sole contention on appeal is that his motion to dismiss was improperly and erroneously denied by the Probate and Family Court on January 30, 1988, as the Probate and Family Court should have found, based on the evidence before it, that the defendant was served with process in the Commonwealth only after being lured here by the deceit and fraud of his wife. The defendant maintains that, since he was lured into the Commonwealth solely for the purpose of having process served upon him, such service is invalid and should be quashed. As is shown below, the plaintiff marshalled sufficient evidence at the hearing of the defendant's motion to dismiss to fulfill her burden of proof as to establishing personal jurisdiction over the defendant. Accordingly, the Probate and Family Court properly denied the defendant's motion to dismiss. Since the Probate and Family Court had personal jurisdiction over the defendant, the Judgment of Divorce Nisi is valid and enforceable.

The defendant, a resident of Alaska, was served with process as he debarked a plane at Logan airport. (A. p. 17) Thereafter, his counsel filed a special appearance and moved to dismiss the complaint because of an alleged lack of personal jurisdiction over the defendant. "When a defendant challenges personal jurisdiction over him . . . he casts upon the plaintiff the burden of proving the court's jurisdiction." *Val Leasing, Inc.* v. *James Hutson d/b/a Dry Creek Farm*, 674 F.Supp. 53, 55 (D. Mass. 1987) citing *Gray* v. *O'Brien*, 777 F.2d 864, 866 (1st Cir. 1985); *Good Hope Industries, Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, (1979). In the context of a Rule 12(b)(2) motion to dismiss, this burden is easily met. *Welsh* v. *Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980) cert. denied 450 U.S. 981 (1981) ("the burden of the plaintiff [to establish personal jurisdiction in the face of a 12(b)(2) motion to dismiss] is relatively slight and the district court must consider the pleadings and affidavits in a light most favorable to the plaintiff").

> [W]hen personal jurisdiction is challenged, a plaintiff must establish a "threshold" showing of jurisdiction but no more. That is, through affidavits and other competent evidence, a plaintiff must make out a prima facie case for the existence of personal jurisdiction, demonstrating at minimum that there is competent evidence to support each of the relevant jurisdictional requirements.

Val Leasing, Inc., supra at 55. *Accord, Gilday* v. *Quinn*, 547 F.Supp. 803, 806 (D. Mass. 1982); *Walsh* v. *National Seating Co., Inc.*, 411 F.Supp. 564, 567 (D. Mass. 1976); *Nelson by Carson* v. *Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983) (in reversing the dismissal of an action for lack of personal jurisdiction, the court held that when the trial court determines a 12(b)(2) motion on written submissions, a party asserting jurisdiction need only assert a prima facie showing that jurisdiction exists and all factual disputes are resolved in its favor).

In most of the reported cases in which a defendant challenges a court's personal jurisdiction in a motion to dismiss, the defendant is a non-resident and, consequently, the plaintiff's "burden" to prove the court's jurisdiction involves a showing that all relevant requirements of the state's long arm statute have been satisfied and that there exist sufficient minimum contacts between the defendant and the forum to support exercise of personal jurisdiction. *See e.g., Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274 (1985); *Good Hope Industries, Inc., supra*; *Droukas* v. *Divers Training Academy*, 375 Mass. 149, (1978); *Raleigh Rug Co., Inc.* v. *R.A. Civitello, Co.*, 23 Mass. App. Ct. 1025, (1987); *Nicholas Associates, Inc.* v. *Starr*, 4 Mass. App. Ct. 91, (1976). In the instant case the court acquired personal jurisdiction over the defendant not through application of the Massachusetts long arm statute, but as a result of the defendant being served while in the Commonwealth. *Thompson* v. *Cowell*, 148 Mass. 552 (1989); Mass. R. Dom. Rel. Pro. 4(d). Thus, in order to establish her "threshold" showing of jurisdiction, the plaintiff need only show that the defendant was served while in the Commonwealth. This showing constitutes a prima facie case which the defendant's allegations of fraud and deceit do not negate. *Val Leasing, Inc., supra* at 55 ("Because the Federal Rules of Civil Procedure contemplate that jurisdictional issues will be determined prior to trial on the merits . . . a plaintiff is not required to go to the time and expense of a full dress jury trial in order to establish the validity of his claim by a fair preponderance of the evidence and a weighing and balancing of the credibility of the relevant witnesses in order to survive a motion to dismiss challenging a Court's personal jurisdiction over the defendant . . .").

It is clear that the defendant himself established the requisite prima facie showing as he conceded in his Affidavit accompanying the motion to dismiss that he received service while in

the Commonwealth. (A. p.17) Upon this evidence alone, the Probate and Family Court was justified in denying the defendant's motion to dismiss. Thus, there was no need whatsoever for the plaintiff to file an affidavit which would, redundantly, allege that the defendant was served with process while in the Commonwealth. Since a prima facie showing of jurisdiction was made, the Probate and Family Court properly denied the defendant's motion to dismiss.[1]

In its brief, the defendant has failed to address the proper standard of review to be applied by the Probate and Family Court in considering the defendant's motion to dismiss (i.e., the plaintiff must establish a prima facie showing of jurisdiction) and has, instead, treated the motion to dismiss as if it were a motion for summary judgment.[2] The defendant argues, that since the plaintiff failed to submit an affidavit in opposition to the defendant's motion to dismiss, all allegations in the defendant's affidavit must necessarily be accepted as true and, accordingly, the Probate and Family Court had no alternative but to accept as true the defendant's contention that his wife lured him into the Commonwealth by fraud and deceit. As noted

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[1] Of course, the defendant could have appealed this denial immediately and/or have challenged the Probate and Family Court's exercise of personal jurisdiction at trial regardless of the denial of the Rule 12(b)(2) motion. If the defendant were sincerely concerned about this matter, he would have requested a full evidentiary hearing. The defendant failed to pursue an interlocutory appeal of the denial of the motion to dismiss and also failed to offer at trial any evidence whatsoever regarding his having been lured into the Commonwealth. Consequently, the plaintiff maintains that the defendant has waived any right to challenge the Probate and Family Court's jurisdiction.

[2] Please note that there is a split of authority as to whether a motion to dismiss pursuant to Rule 12(b)(2), becomes a motion for summary judgment if the parties submit affidavits. *See Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274, 292 (1985) (because Probate and Family Court's rulings on a Rule 12(b)(2) motion took into account factual material outside the pleadings, the Supreme Judicial Court treated the order of dismissal as a summary judgment). The weight of authority, however, indicates that such a motion does *not* become a motion for summary judgment. *See, Attwell* v. *LaSalle National Bank*, 607 F.2d 1157 (5th Cir. 1979) (not a motion for summary judgment); *Moore's Federal Practice*, Vol. 2A, ¶12.07[2.-2, n.4].

above, this framing of the issues completely misperceives the standard of review applicable to the defendant's motion to dismiss and focuses on irrelevant allegations of motive and state of mind. Nevertheless, even if: (1) the defendant were correct to disregard the limited scope of the plaintiff 's burden of proof; and (2) the proper standard of review was that applicable under a motion for summary judgment, it does *not* follow that the defendant was entitled to prevail in it's motion to dismiss because the plaintiff chose not to file an affidavit. The Probate and Family Court has discretion to refuse summary judgment even if the opposing party files no opposition and stands mute. *U.S.* v. *31 Photographs,* 156 F.Supp. 350 (D.C. N.Y. 1957). Regardless of the plaintiff 's burden to show jurisdiction, the defendant bears the burden (if this were a motion for summary judgment) to show the lack of a genuine issue of material fact and that he is entitled to judgment as a matter of law. The defendant failed to make this showing.

The defendant is also mistaken in its contention that, since the plaintiff chose not to file an affidavit, the Probate and Family Court was obliged to accept as true the allegations contained in the defendant's affidavit. *See e.g., Cellini* v. *Moss,* 232 F.2d 371 (D.C. Cir. 1956); *Subin* v. *Goldsmith,* 224 F.2d 753 (2nd Cir. 1955) cert. denied 350 U.S. 883. In fact, the Probate and Family Court rightly should have ignored any and all argumentative and conclusory assertions in the defendant's affidavit. *Nichols Associates, Inc.* v. *Starr,* 4 Mass. App. Ct. 91, 93 n.1 (1976). Stripped of argumentative and conclusory assertions, the defendant's affidavit by no means establishes the lack of a genuine issue of material fact or that the defendant is entitled to judgment as a matter of law. By claiming that the plaintiff "became hysterical and screamed I had to come to Boston so that we could talk" (A. p.17) and that the defendant was served with process when he debarked from the plane at Logan, it does *not* necessarily follow

that the plaintiff acted deceitfully or fraudulently. The defendant infers from these allegations that the plaintiff must have intended to deceive the defendant and argues that the Probate and Family Court had no choice but to ascribe to the plaintiff a deceitful state of mind since the plaintiff has not specifically exonerated herself by affidavit. Under Massachusetts law, however, courts rarely grant summary judgment where state of mind is an essential element. *Quincy Mut. Fire Ins. Co.* v. *Abernathy*, 393 Mass. 81 (1984) (the granting of summary judgment is disfavored when state of mind is an element); *Poller* v. *C.B.S.*, 368 U.S. 464 (1962) (a judge must be circumspect when state of mind involved).[3]

As was argued to the Probate and Family Court in the plaintiff's Memorandum in Opposition to the Defendant's Motion to Dismiss (Supp. A. pp. 3-5), the plaintiff was physically disabled and could *not* travel to Vermont to meet her husband. In fact, the plaintiff only decided to have process served on the defendant upon recommendation of counsel *after* the defendant had indicated that he would visit the plaintiff in Boston. (Supp. A. pp. 3-5).[4]

V. CONCLUSION

The Probate and Family Court properly denied the defendant's motion to dismiss since the plaintiff established a prima facie showing of personal jurisdiction over the defendant by showing that the defendant was served with process while he

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[3] It is unlikely that a defendant could ever prevail on a motion for summary judgment which involves allegations of fraud if he supports this motion with only his own affidavit since he does not have "personal knowledge" of the plaintiff's state of mind. *See* Mass. R. Civ. P. 56(e).

[4] The plaintiff was present at the hearing of the defendant's motion to dismiss and was prepared to testify as to these matters if the defendant's counsel chose to examine her. As the requisite prima facie showing was established, counsel for the plaintiff saw no need to examine the plaintiff.

was in the Commonwealth. The fact that the plaintiff chose not to file an affidavit *in no way* undermined the validity of the Probate and Family Court's denial of the defendant's motion to dismiss. Accordingly, the Probate and Family Court had personal jurisdiction over the defendant and the Judgment of Divorce Nisi is valid and enforceable.

In view of the frivolous nature of this appeal, the plaintiff requests that this court award the plaintiff $3,000.00 for the costs and attorney's fees incurred by the plaintiff in answering the defendant's appeal.

Respectfully submitted,
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By her attorney,

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COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

NORFOLK, SS. 1988 SITTING

NO. 88-P-1046

GARRIE JOAN KLAVAN
APPELLEE

v.

AVRAM MACY KLAVAN
APPELLANT

SUPPLEMENTARY APPENDIX

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

TRIAL COURT
PROBATE & FAMILY
DEPARTMENT
No. 86D-1093-D1

GARRIE JOAN KLAVAN
Plaintiff

v.

AVRAM MACY KLAVAN
Defendant

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

In its Motion to Dismiss, the defendant, raises two issues:

1. That the plaintiff obtained personal service on the defendant by fraud and deceit; and

2. That Vermont is a more appropriate forum than Massachusetts to resolve the disputed issues.

This Court should deny the defendant's Motion to Dismiss since the defendant received valid personal service and Massachusetts is a more appropriate forum than Vermont to resolve this action. A more detailed analysis of these issues is provided below.

FACTS

Garrie and Avram Klavan were married in New York on May 29, 1966. In January of 1970, the Klavans moved to Ver-

mont. Garrie and Avram Klavan sought marital counseling beginning in 1980. In January of 1982, Garrie Klavan was diagnosed as suffering from an adrenal tumor. Two months later, Garrie Klavan underwent extensive surgery in an apparently successful attempt to remove the tumor.

Avram Klavan left his wife and two children and moved to Alaska in August of 1983. Twice in 1984, Avram flew to Vermont to visit his wife and children and to explore reconciliation. The parties, however, were unable to resolve their differences. In June of 1984, Garrie discovered that Avram was living with another woman. In January of 1985, Garrie Klavan flew to Alaska to discuss reconciliation with her husband. Avram rejected Garrie's suggestion that she move to Anchorage. At this time, the couple discussed the prospect of divorce.

During the Spring of 1985 financial problems compelled Garrie to leave Vermont. In May of 1985, Garrie Klavan accepted a job with the Harvard Hillel as head chef. She then left Vermont with her two children and moved permanently to Massachusetts in July of 1985. Garrie Klavan has maintained her domicile in Massachusetts since that time.

In August of 1985, Avram flew to Massachusetts to visit Garrie. Again, the parties were unable to reach a reconciliation and Avram returned to Alaska. In October of 1985 the parties acknowledged that divorce was inevitable.

During the summer of 1986, Garrie and Avram made plans to meet in Vermont to discuss divorce. During this same summer, Garrie was compelled to seek emergency medical treatment on three separate occasions prior to their planned rendezvous. On account of these emergency episodes, Garrie was physically unable to travel to Vermont to meet her husband. Accordingly, Garrie telephoned Avram and explained her medical problems. Avram agreed to meet her in Boston as he had done before in order to discuss their divorce. While in Vermont, and prior to flying to Boston, Avram confided to two friends that

he was travelling to Boston to discuss the prospect of divorce with Garrie.

Only after learning that her husband was to visit her in Massachusetts to discuss divorce, did Garrie contact and retain Burns and Levinson to represent her in divorce proceedings.

Avram Klavan received personal service of Garrie's Complaint for Divorce as he disembarked his flight at Logan.

ARGUMENT

I. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANT AS HE VALIDLY RECEIVED PERSONAL SERVICE WHILE WITHIN THE COMMONWEALTH.

In order for this Court to acquire personal jurisdiction over the defendant, the defendant must either 1) receive personal service while in the Commonwealth, 2) accept service, or 3) come within the provisions of the Massachusetts Long Arm Statute. Mass.R.Dom.Rel.P. 4(d)(1)(2); Mass.G.L.c. 227, §1 (1985); Mass.G.L.c. 223A, §3 (1985).

As shown above, Avram Klavan was served personally with Garrie's Complaint for Divorce while in the Commonwealth. This service is valid and vests this court with personal jurisdiction over the defendant provided that the defendant is present voluntarily, not because of trick or fraud, and not to appear in court on an unrelated matter. *Wolfson* v. *Wolfson*, 455 So.2d 577, 578 (Fla.App. 4 Dist. 1984); *Gulda* v. *Second Nat. Bank of Boston*, 323 Mass. 100 (1948); *Thompson* v. *Lowell*, 148 Mass. 552 (1889).

As stated above, Garrie Klavan was unable to meet with her husband in Vermont in August, 1986 due to her poor state of health. The parties, therefore, made alternative plans for

Avram to meet Garrie in Boston. This was not at all unusual since Avram had previously visited Garrie in Boston. It was also not unusual that the parties were going to discuss divorce. Garrie and Avram had lived apart for three years. Avram had been living with another woman for more than two and a half years. They had discussed reconciliation and rejected it on several occasions. In short, both parties knew that divorce was inevitable. Prior to August of 1986, however, neither party had initiated divorce proceedings. There was no trick or deceit involved in this arrangement.

Only after learning of her husband's imminent visit did Garrie seek Burns & Levinson for legal counsel and was advised to have process served on her husband while he was in the Commonwealth. Avram Klavan was not lured into Massachusetts. Therefore, since Avram Klavan was validly served with process, this Court has personal jurisdiction over the defendant.

II. VERMONT IS NOT AN APPROPRIATE FORUM TO RESOLVE THE PARTIES' DISPUTE.

Simply put, Vermont is not an appropriate forum since *Neither* party has residence there; in fact, each of the parties has resided outside of Vermont for almost 2 years. Moreover, contrary to defendant's assertion, Massachusetts is a more appropriate forum than Vermont to hear this divorce action. This becomes clear when one considers the "comparative advantages of one forum over another." *Doe* v. *Roe*, 377 Mass. 616, 619 (1979).

While Garrie and Avram Klavan lived together in Vermont for approximately thirteen years, neither one of them resides there now. Avram abandoned his wife and children in Vermont in 1983 and established residence in Alaska. Garrie left Ver-

mont in July of 1985 and established residence in Massachusetts. Neither party has any present intention to return to Vermont. The parties do not own any property in Vermont. The Klavan children do not live in Vermont.

Garrie Klavan is a resident of Massachusetts. She pays income tax in Massachusetts. She has a Massachusetts driver's license. She is currently applying for unemployment in Massachusetts. She lives in an apartment in Brookline under a lease in her name.

Moreover, Garrie Klavan intends to remain a Massachusetts resident into the foreseeable future. As shown, the "comparative advantages" weigh heavily in favor of Massachusetts exercising jurisdiction in this case.

This court should also consider that a Vermont Court would not hear the Klavan divorce since neither party is a Vermont resident. A condition precedent to Vermont courts hearing divorce proceedings is that a party reside within the state for a specified period *and retain* residence in the state. Vt. Stat. Ann. Title 15, §592 (1974). Vermont courts are without statutory power to hear divorce cases between non-residents. *Connolly* v. *Connolly*, 132 Vt. 65 (1973). Therefore, since neither Garrie nor Avram Klavan are Vermont residents and neither have retained a residence in Vermont, Vermont courts have no jurisdiction to resolve their dispute.

CONCLUSION

Avram received valid personal service of his wife's complaint for Divorce; he was not tricked or deceived into entering the Commonwealth for this purpose and in fact had met with his wife on a prior occasion. As shown above, Massachusetts is a more appropriate forum than Vermont to hear this divorce

action. For all the above reasons, this Court should deny the defendant's Motion to Dismiss.

Respectfully Submitted,
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